Filed 3/27/19 Marriage of Dartnall CA2/1

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

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| In re Marriage of ZENA and GARY DARTNALL. | B284498<br><br>(Los Angeles County Super. Ct. No. D106021) |
| ZENA DARTNALL,<br><br>Respondent,<br><br>v.<br><br>GARY DARTNALL,<br><br>Appellant. | |

APPEAL from an order of the Superior Court of Los Angeles County, Christine Byrd, Judge. Affirmed.

Blut Law Group, Elliot S. Blut, and Sara V. Katz for Appellant.

Feinberg, Mindel, Brandt & Klein, Matthew K. Skarin, and Cierra Vaughn for Respondent.

## INTRODUCTION

Zena and Gary Dartnall married in 1962, and divorced in 1986. To resolve their dissolution, they executed a marital settlement agreement (MSA) which was incorporated into a judgment. Among other things, the MSA divided their interests in the marital residence and provided Gary would pay spousal support along with certain other amounts to Zena.[1] When Gary stopped paying those required sums, the parties agreed in 1994 via a co-signed, notarized letter that Gary would waive his interest in the marital residence in return for forgiveness of past and future support obligations.

In 2017, the parties disputed when Gary's waiver of his interest in the marital residence became effective. Zena argued Gary had already waived his interest, while Gary claimed his waiver was not effective until the marital residence was sold to a third party. After Zena filed a request for order to enforce the 1994 letter agreement, the trial court agreed with Zena and ordered Gary to quitclaim his remaining interest in the property in Zena's favor. Although we construe the contractual language somewhat differently than did the trial court, we agree the relief ordered was appropriate and affirm.

## FACTUAL BACKGROUND

Zena and Gary had a long-term marriage of over twenty years. After the filing of a dissolution petition, the parties

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[1] As is customary in marital dissolution cases, we refer to the parties by their first names for ease of reading and to avoid confusion, not out of disrespect. (*In re Marriage of James & Christine C.* (2008) 158 Cal.App.4th 1261, 1264, fn. 1.)

reached an MSA dated January 28, 1986. A judgment of dissolution was thereafter entered incorporating the MSA's terms.

### A. The 1986 MSA and Judgment

As pertinent to this appeal, the MSA awarded to each party as their separate property an undivided one-half interest in the family residence on Doheny Drive in Los Angeles, with title to be held as joint tenants. Another property in New York was also divided one-half to each party, with the MSA providing title to that residence would be held as tenants in common. Zena was awarded the right to occupy the Doheny residence until the property was sold. Zena had the right to determine when the Doheny residence would be sold, subject to certain conditions not applicable here, with any gain upon sale attributed 50 percent to each party. Before the Doheny property was sold to any third party, Zena had a right to buy out Gary's interest. If she did not exercise that right, Gary then had a right to buy out Zena's interest before the property was listed for sale to a third party.

Gary agreed and was ordered to pay Zena spousal support of $4,500 a month. Gary was also to pay the mortgage, real estate taxes and insurance on the Doheny property (housing expenses) during the time Zena occupied it, and Zena was not to further encumber the property. Gary was permitted to use the Doheny property as collateral for loans. If he did so, he was solely responsible for any such debt, and was to hold Zena harmless from any encumbrance-related expenses.

The judgment provided the "Court shall reserve jurisdiction to make any further orders as may be necessary in connection with the Doheny Drive residence," and that "the spousal support

provisions contained in this Judgment shall remain subject to the jurisdiction of the Los Angeles Superior Court." Following entry of judgment, neither party requested or filed any change in recorded title for the Doheny property.

### B. Postjudgment Issues Regarding Payment of Support and Housing Expenses

Following entry of judgment, Zena continued to live at the Doheny residence. The parties dispute whether Gary paid the required housing expenses prior to May 1990, but agree that no such payments were made after May 1990. Gary made the required spousal support payments until April 1990, after which time he stopped and made no further payments.

#### *1. The 1994 Letter Agreement*

In April 1994, without the apparent involvement of counsel, the parties entered into a notarized, co-signed letter agreement to settle the outstanding issue of Gary's failure to pay support and housing expenses. As part of the agreement, Gary acknowledged that after May 1990 he had not paid either spousal support or any of the required housing expenses on the Doheny residence. In return for Zena's agreement to waive repayment of the unpaid spousal support, future spousal support payments, and repayment of housing expenses she had advanced, Gary agreed "that on sale to waive [sic] any and all claim to my undivided one-half interest in the [Doheny] residence . . . ." The agreement indicated that other than this modification, all other terms and conditions of the MSA "remain in full force and effect." Following execution of the letter agreement, neither party requested any change in recorded title. Nor did Gary seek a court order terminating his support obligations under the MSA.

### *2. The Home Equity Loans*

In 2002, Gary obtained a $250,000 loan using the Doheny property as security. Both parties were listed as borrowers on the loan, and the short form deed of trust signed by both parties indicated Gary and Zena jointly owned the property (it also erroneously indicated they were still married). Zena did not tell the lender that Gary had no interest in the property. Zena told the trial court she was aware at the time of this loan "that the Doheny Drive property was held in joint title between [Gary] and me," and that she did not review the loan documents before signing them.

In June 2006, Gary proposed to assign all of his interest in the Doheny property to Zena if she agreed in exchange to help pay off the $250,000 loan Gary had taken out "if and when" Zena sold the house, and further agreed "that except for [Zena's] half interest in my EMI retirement plan, [Gary has] no financial or insurance obligation" under the MSA. Zena did not accept this proposal, believing Gary already had given her his 50 percent interest in the Doheny residence, and that she should not be responsible for any payments on the loan taken out in Gary's favor.[2]

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[2] Zena later signed this proposal in 2017 in connection with the parties' settlement discussions, as it provided Gary assigned his interest in Doheny without the disputed "on sale" language in the 1994 letter agreement. Gary objected to a purported 2017 acceptance of the 2006 offer. Zena's counsel told the trial court that the signed version of the 2006 agreement was "extraneous" and "not particularly necessary" because Zena was relying primarily on the 1994 letter agreement. Accordingly, the trial court did not resolve Gary's objection to the purported

In 2013, the loan was refinanced. As with the prior loan, both parties were listed as borrowers and the lender was informed both owned the property. The short form deed of trust for the 2013 loan indicated the parties were unmarried, and held title as joint tenants. As with the 2002 loan, Zena understood at the time of this loan that the Doheny property was held in joint title with Gary, but stated she did not review the loan documents before signing them. In addition, in 2013 the parties executed and recorded a quitclaim deed indicating they now held title as an unmarried man and woman as joint tenants.

## PROCEDURAL BACKGROUND

In early 2017, Zena requested that Gary quitclaim his interest in the Doheny property to Zena, or in the alternative that spousal support arrearages be calculated and Gary's interest in the Doheny property assigned to Zena as payment for those arrears.

When Gary refused, Zena filed a request for order in April 2017. Zena sought determination of spousal support arrearages and housing expense reimbursements, and an order pursuant to Code of Civil Procedure section 664.6 enforcing the 1994 letter agreement by awarding Zena the Doheny property as her sole and separate property in return for her waiver of such payments.[3]

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acceptance, and did not rely on the 2006 letter or any acceptance of it.

[3] Zena also requested an order that Gary was responsible for any encumbrance on the property (a request Gary did not dispute), and sanctions pursuant to Family Code section 271 (a

Gary opposed the request for order, contending Zena was attempting to rewrite the 1994 letter agreement. Gary contended he did not relinquish his interest in the Doheny property under the 1994 agreement until the property was sold, and since the property had not yet sold he still owned a one-half interest in it. Gary claimed that the parties' actions after the 1994 letter agreement, in particular Zena's signing of loan documents and permitting Gary to encumber the Doheny property, corroborated Gary's continuing entitlement to 50 percent of the property until it was sold. Gary additionally contended that, by virtue of the 2013 quitclaim deed, the property was held as joint tenants with a right of survivorship. In Gary's view, this meant if Zena passed away without selling the Doheny property he was entitled to the entire property as his sole and separate property without compensation for unpaid spousal support and housing expenses going back to 1990.

The trial court found Zena retained as separate property the 50 percent interest in the Doheny property she received as part of the 1986 judgment, without Gary having any right to that interest if Zena pre-deceased him. The court further found that Gary waived his 50 percent interest in the Doheny property as part of the 1994 amendment in exchange for the waiver of his support and housing expense obligations, that pursuant to the agreement Zena had foregone over $3.4 million in payments that would otherwise have been owed, and therefore Zena was entitled to the entirety of the Doheny property as her sole and separate property. The court ordered Gary to execute a quitclaim deed of his interest in the property in Zena's favor.

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request Gary did dispute). The trial court's rulings on those two requests are not challenged on appeal.

Gary timely appealed.

## DISCUSSION

Resolution of this appeal requires interpreting three documents—the 1986 MSA, the 1994 letter agreement, and the 2013 quitclaim deed. After setting forth the standard of review and applicable rules of contract interpretation, we discuss each document in turn.

### A. Standard of Review

An MSA incorporated into a dissolution judgment is construed under the statutory rules governing the interpretation of contracts generally. (*In Re Marriage of Hibbard* (2013) 212 Cal.App.4th 1007, 1012 (*Hibbard*).) The trial court found the language of the agreements at issue sufficiently definite to interpret without considering extrinsic evidence. "Where no extrinsic evidence is introduced, or the extrinsic evidence is not in conflict, we independently construe the agreement. [Citation.] Where competent extrinsic evidence is in conflict, we uphold any reasonable construction by the lower court." (*In Re Marriage of Schu* (2014) 231 Cal.App.4th 394, 399.)

With regard to the 1994 letter agreement, Code of Civil Procedure section 664.6 is available in family law matters to enforce signed written agreements regarding support reached after entry of judgment where, as here, the judgment provides the court retains jurisdiction over the support issue addressed by the section 664.6 motion. (*In Re Marriage of Armato* (2001) 88 Cal.App.4th 1030, 1038.) Factual determinations made by a trial court on a section 664.6 motion must be affirmed if the trial court's factual findings are supported by substantial evidence.

(*In re Marriage of Assemi* (1994) 7 Cal.4th 896, 911.) Other rulings on a section 664.6 motion are reviewed de novo for errors of law. (*Weddington Productions, Inc. v. Flick* (1998) 60 Cal.App.4th 793, 815.)

We are not bound by the trial court's reasoning, and may affirm the relief ordered below if it was correct on any theory. (*Young v. California Fish & Game Com.* (2018) 24 Cal.App.5th 1178, 1192–1193.)

### B. Contract Interpretation Principles

" 'The fundamental goal of contractual interpretation is to give effect to the mutual intention of the parties. [Citation.] If contractual language is clear and explicit, it governs. [Citation.] On the other hand, "[i]f the terms of a promise are in any respect ambiguous or uncertain, it must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it." [Citations.]' [Citation.] 'The mutual intention to which the courts give effect is determined by objective manifestations of the parties' intent, including the words used in the agreement, as well as extrinsic evidence of such objective matters as the surrounding circumstances under which the parties negotiated or entered into the contract; the object, nature and subject matter of the contract; and the subsequent conduct of the parties. [Citations.]' [Citations.]" (*People v. Shelton* (2006) 37 Cal.4th 759, 767; see also *Hibbard*, *supra*, 212 Cal.App.4th at p. 1013.)

### C. The 1986 MSA Provided for Two Types of Sale Events—A Buy Out Between the Parties, and a Sale to a Third Party

The 1986 MSA provided Gary would retain his 50 percent interest in the Doheny property and not receive cash for it until the property was sold. Subject to two exceptions not applicable here, Zena controlled when such a sale event took place.[4] Before the property was marketed for sale to a third party, Zena had a right to buy out Gary's interest (in other words, to make Gary sell it to her) based on an appraised value. If Zena was unwilling or unable to exercise her buyout right, Gary then had a right to buy out Zena's interest before the property was offered to a third party.

### D. The 1994 Letter Agreement Did Not Modify Zena's Right to Buy Out Gary's Interest

The 1994 letter agreement did not alter the buyout/sale to third party construct in the MSA with regard to cashing out interests in the Doheny property. In consideration for Zena waiving her right to past and future support as well as reimbursement for housing expenses she had advanced, Gary agreed "on sale" to waive his claim to his 50 percent interest in

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[4] In the absence of Zena agreeing to sell, the MSA provided a sale could be triggered only upon Zena's remarriage or after 90 days of continual "cohabitation" as that term was defined by the MSA.

the Doheny property as provided in the MSA.[5] All other terms and conditions of the MSA remained in full force and effect.

Some 25 years after entering the 1994 agreement, the parties now dispute the meaning of "on sale" as used in that agreement. Gary argues "on sale" must be interpreted to mean a sale to a third party. Because no such sale has occurred, Gary reasons that he still retains his 50 percent interest and the court erred in ordering him to quitclaim it to Zena now. Zena asserts the "on sale" language should be disregarded as inconsistent with the parties' overall agreement, and that upon execution of the 1994 letter agreement she immediately owned 100 percent of the Doheny property. Looking at the contractual language, the object of the contract, the circumstances under which the parties negotiated the agreement, and the subsequent conduct of the parties, neither of these readings is tenable.

### *1. Gary's Interpretation of the 1994 Agreement*

The 1994 letter agreement provided only that a sale needed to occur, not who the parties to any such transaction needed to be. "Sale" means simply "the exchange of a commodity for money or other valuable consideration." (Oxford English Dictionary

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[5] Parties can prospectively waive court ordered spousal support, but cannot lawfully contract to forgive past due spousal support payments absent dispute over the amount owed. (*In Re Marriage of Sabine & Toshio M.* (2007) 153 Cal.App.4th 1203, 1212–1217.) While the parties dispute the value of the Doheny property, either of their competing valuations would mean the value of Gary's interest was sufficient to compensate for past due support payments, as well as a lump sum amount to account for future support payments.

<oed.com/view/entry/169951?rskey=zODDlt&result=2#eid> [as of Mar. 20, 2019]); see also Merriam-Webster Unabridged Dictionary <merriam-webster.com/dictionary/sale> [as of Mar. 19, 2019] [sale means "the transfer of ownership of and title to property from one person to another for a price"].) It does not presume who the parties must be to the exchange or transfer.

Gary's interpretation reads into the letter agreement words it does not contain. In Gary's view, "on sale" can only mean "on sale to a third party." That is not what the 1994 letter agreement says, and we decline to add such qualifying language because it "would substantially alter the agreement reached by the parties . . . ." (*In Re Marriage of Iberti* (1997) 55 Cal.App.4th 1434, 1440 (*Iberti*).) Given that the 1994 letter agreement amended the 1986 MSA, we interpret both documents in concert. With regard to the Doheny property, the MSA provided for two types of sale events. Zena had a right before any sale to a third party to make Gary sell his half of the property to her if she could afford to purchase it (and Gary had a similar right if Zena did not exercise her right). Alternatively, upon Zena's consent the property could be sold to a third party. The 1994 agreement did not disturb these provisions. Accordingly, the buyout provision remained part of the MSA. (*Cedars-Sinai Medical Center v. Shewry* (2006) 137 Cal.App.4th 964, 980–981 [where amendment does not modify original contract term, that original term remains part of the agreement].) Sale therefore included a buyout between the parties as well as sale to a third party.

In addition to adding a term not in the agreement, Gary's interpretation is inconsistent with the parties' intent. Gary's interpretation would mean that Zena (who had lived in the Doheny residence for nearly a decade at the time of the 1994

agreement, planned to continue living there, and had no plans to sell the property to a third party) intended to waive millions of dollars in support and housing expenses owed to her, as well as her 50 percent interest in the Doheny residence, without receiving anything in return, unless she sold the house to a third party before she passed away. The 1994 agreement evinces no such intent. We agree with the trial court that it is not reasonable to believe the parties intended that the 1994 agreement put Zena in a worse financial position than she was before the parties entered it.[6] Even if its "on sale" language is ambiguous, we cannot construe the 1994 agreement as meaning Zena so broadly waived spousal support as "[a]ny ambiguity in the language of such an agreement must be construed in favor of the right to spousal support." (*Iberti*, *supra*, 55 Cal.App.4th at p. 1439.)

### *2. Zena's Interpretation of the 1994 Agreement*

Whereas Gary seeks to read into the letter agreement words it does not contain, Zena seeks to strike words the

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[6] Gary asserts for the first time in his reply brief that his having a continuing interest until a third party sale makes sense because 50 percent of the Doheny property is worth significantly more than the amount purportedly owed in support and housing expenses. We decline to consider this argument as it was not raised in Gary's opening brief. (*Alcazar v. Los Angeles United School Dist.* (2018) 29 Cal.App.5th 86, 100, fn. 5.) In any event, the fact the Doheny property may have subsequently appreciated more in value than Gary expected when he proposed (and Zena accepted) the letter agreement is irrelevant to the parties' intent in 1994.

agreement does contain. While the 1994 agreement states Gary's waiver of his interest is effective "on sale," and there is no other language in the 1994 letter regarding timing, Zena asserts Gary's waiver was in fact immediately effective regardless of any sale. In her view, giving effect to the "on sale" term would lead to an absurd and repugnant result, and therefore that term should be disregarded.

We find nothing absurd or repugnant in honoring the plain language of the 1994 agreement that to become effective, the waiver of Gary's interest required a future triggering sale event. The original MSA required a sale (either between the parties, or with a third party) to monetize the parties' respective interests in the residence. It makes sense, rather than being absurd or unreasonable, for the parties to continue to use that same approach as part of the 1994 letter agreement.

Moreover, the parties' actions after 1994 are not consistent with Zena's current interpretation of the letter agreement. "In construing contract terms, the construction given the contract by the acts and conduct of the parties with knowledge of its terms, and before any controversy arises as to its meaning, is relevant on the issue of the parties' intent." (*Southern Pacific Transportation Co. v. Santa Fe Pacific Pipelines, Inc.* (1999) 74 Cal.App.4th 1232, 1242.) Zena took no steps after the letter agreement to modify recorded title to remove Gary, and stated in a declaration supporting her request for order that following the 1994 agreement she was aware that the Doheny property was held in joint title with Gary. The parties understood Gary could still borrow against the property (subject to the hold harmless), which suggested he had some continuing interest in the property. Indeed, following the 1994 agreement Zena in fact represented to

two lenders that Gary still had an interest in the property. Finally, the parties jointly executed and recorded a grant deed in 2013 indicating that Gary still had the same interest in the Doheny property provided by the terms of the 1986 MSA. None of these many actions by Zena is consistent with interpreting the letter agreement as effecting an immediate transfer of Gary's interest in the property to Zena in 1994.

### *3. Zena Was Entitled to the Quitclaim Deed Ordered by the Trial Court*

While we disagree with Zena's attempt to excise the "on sale" term, the 1994 letter agreement nevertheless supports her request for a quitclaim deed and the relief awarded by the trial court. Zena had a unilateral right to buy out Gary's interest in the Doheny property. Under the 1986 MSA, for purposes of a buyout Gary's interest was to be valued by a real estate appraiser. Under the 1994 letter agreement, the parties agreed Gary's interest would be exchanged for a waiver of past and future spousal support, as well as a waiver of Gary's reimbursement of housing expenses paid by Zena. The 1994 letter agreement was effectively a pre-payment by Zena for Gary's interest whenever she chose to exercise her buyout right and make Gary sell her his interest. To exercise that buyout option under the MSA, Zena was required only to provide written notice, which she did in requesting Gary execute the quitclaim deed in her favor.[7]

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[7] Zena suggests that inclusion of the "on sale" language in any form would cause the 1994 letter agreement to fail for lack of consideration because otherwise there would be no detriment to Gary and no benefit to Zena. We do not agree that Zena's waiver

While our interpretation of the 1994 agreement gives effect to the "on sale" language the trial court effectively struck, the net result is the same. Zena was entitled to effectuate a sale of Gary's 50 percent interest in the property to herself under the buyout provision, and Gary refused to honor that right. The trial court appropriately enforced the 1994 letter agreement (and the underlying MSA) by ordering Gary to execute a quitclaim deed transferring his interest in the Doheny property to Zena to complete the buyout.

### C. The 2013 Quitclaim Deed Created No Right to the Property Independent of the MSA

Gary further argues Zena amended the parties' MSA and the 1994 letter agreement, and gave him a right of survivorship in the Doheny property, by executing a 2013 quitclaim deed. That 2013 deed conveyed the property from its pre-dissolution title (held as husband and wife) to "Gary Dartnall, an Unmarried Man and Zena Dartnall, an Unmarried Woman as joint tenants." The trial court found the 2013 deed parroted the 1986 MSA, did not grant either party additional rights in the Doheny property,

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of support and housing expense reimbursement was gratuitous. Zena had a right to buy out Gary's interest. In return for waiving her claims to support and housing expenses, she effectively pre-paid the purchase of Gary's interest while retaining her unilateral right to trigger when Gary's interest would be sold to her. When a property owner binds himself to sell on specific terms (as Gary did in the MSA), and the other party has discretion when she will trigger the purchase and has given consideration for it (as Zena did here), the promises are not illusory but an option contract supported by consideration. (See generally *Steiner v. Thexton* (2010) 48 Cal.4th 411.)

and therefore Zena's undivided one-half interest remained her sole and separate property.

The judgment provided that each party was awarded as their "sole and separate property" an undivided one-half interest in the Doheny property, and that "title shall be held in joint tenancy . . . ." This was in contrast to another marital property which the MSA divided with title to be held as tenants in common. With regard to the Doheny property, the 2013 quitclaim deed thus reiterated the terms of the MSA (which by 2013 included the 1994 amendment to the MSA) and did not, as Gary contends, modify Zena's interest. The parties continued to hold title as joint tenants until a sale event.

As no term of the parties' agreement said otherwise, Zena was entitled to sever the joint tenancy without Gary's consent. (Civ. Code, § 683.2, subd. (a)(2).) "[A] joint tenant's right of survivorship is an expectancy that is not irrevocably fixed" and can be "destroyed by voluntary conveyance." (*Tenhet v. Boswell* (1976) 18 Cal.3d 150, 155-156.) By bringing a motion to enforce her rights under the MSA and 1994 letter agreement, and obtaining an order requiring Gary to execute a quitclaim deed in her favor, any joint tenancy or right of survivorship was severed. (Civ. Code, § 683.2, subd. (a)(2).)

## DISPOSITION

The August 4, 2017 order is affirmed. Zena Dartnall is to recover her costs on appeal.

NOT TO BE PUBLISHED

WEINGART, J.*

We concur:

ROTHSCHILD, P. J.

JOHNSON, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.